Affin Bank Bhd v Ravindra Rajah a/l Sanmugam

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D8–22–1478 OF 2005
KANG HWEE GEE J
15 AUGUST 2007

Civil Procedure — Summary judgment — Appeal — Appeal against decision of senior assistant registrar dismissing O14 application — Whether triable issues raised — Whether proper case for summary judgment

Civil Procedure — Summary judgment — Whether triable issues raised — Whether allegation of collusion was bare allegation — Whether defendant bound by documents executed by him

The plaintiff filed this claim against the defendant arising from the default by the defendant in maintaining the requisite margin under the margin facility granted by the plaintiff to the defendant. The plaintiff applied for summary judgment under O 14 of the Rules of the High Court 1980. The plaintiff's application was dismissed by the senior assistant registrar. The plaintiff appealed to the judge in chambers against the decision of the senior assistant registrar.

Held, allowing the appeal:

(1) The purpose of O 14 is to enable a plaintiff to obtain summary judgment without trial, if he can prove his claim clearly, and if the defendant is unable to set up a bona fide defence, or raise an issue against the claim which ought to be tried. When the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff (see paras 6–7).

(2) The plaintiff had set out in a clear and orderly manner its claim against the defendant exhibiting the relevant documents to support the fact that the defendant had executed for the loan, the breach of the margin, the failure of the defendant to rectify the default, and the computation of the sums due (see para 8).

(3) The defendant was unable to show that there ws a fairly arguable case that ought to go for trial. His claim that the employees of the plaintiff had colluded with a third party called Esmail who had used his account was but a bare assertion not substantiated by any specific particulars. Similarly the affidavits affirmed by the former personal clerk of Esmail deposing to the fact that her previous employer Esmail had dealt with the plaintiff's cheques and documents without saying specifically whether these were cheques and documents relating

to this case, were also bare assertions calculated to deflect the real issue in dispute from being properly deliberated upon (see para 9).

(4) The fact that the defendant may not have signed the documents exhibited in the plaintiff's supporting affidavit before the advocate and solicitor Phang Sweet Lee, who acted for the plaintiff was irrelevant as the defendant had admitted that he had indeed signed all the documents exhibited in the supporting affidavit of the plaintiff including the facility agreement. The defendant was bound by the documents that he signed with the plaintiff. He had failed to show by 'affidavit or otherwise' that Esmail had colluded with the employees of the plaintiff in operating the facility that the plaintiff granted to him (see paras 10–11).

[Bahasa Malaysia summary

Plaintif telah memfailkan tuntutan terhadap defendan berikutan daripada kemungkiran defendan untuk mengekalkan margin yang diperlukan di bawah kemudahan margin yang diberikan oleh plaintif kepada defendan. Plaintif memohon untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Permohonan plaintif telah ditolak oleh penolong kanan pendaftar. Plaintif merayu kepada hakim dalam kamar terhadap keputusan penolong kanan pendaftar.

Diputuskan, membenarkan rayuan:

(1) Tujuan A 14 adalah untuk membolehkan plaintif mendapatkan penghakiman terus tanpa perbicaraan, jika beliau dapat membuktikan dengan jelas tuntutannya, dan jika defendan tidak dapat mewujudkan pembelaan bona fide, atau membangkitkan isu terhadap tuntutan yang akan dibicarakan. Bila hakim telah berpuas hati bukan sahaja tiada pembelaan tetapi tiada perkara yang boleh dihujahkan seadilnya sebagai pertikaian bagi pihak defendan ianya adalah menjadi tugasnya untuk memberikan penghakiman kepada plaintif (lihat perenggan 6–7).

(2) Plaintif telah menyatakan tuntutannya dengan jelas dan teratur terhadap defendan dengan mengeksibitkan dokumen-dokumen yang relevan bagi menyokong fakta bahawa defendan telah melaksanakan pinjaman, perlanggaran kepada margin, kegagalan defendan untuk memulihkan kemungkiran, dan pengiraan jumlah-jumlah yang tertunggak (lihat perenggan 8).

(3) Defendan tidak berupaya menunjukkan bahawa terdapat kes yang boleh dipertikaikan yang akan membawa kepada perbicaraan. Dakwaannya bahawa pekerja-pekerja plaintif telah berpakat dengan pihak ketiga bernama Esmail yang telah menggunakan akauannya adalah pernyataan kosong yang tidak disokong oleh butiran-butiran yang spesifik. Begitu juga dengan afidavit yang diikrarkan oleh bekas kerani peribadi Esmail yang mendeposkan fakta bahawa bekas majikannya Esmail telah berurusan dengan cek-cek plaintif dan dokumen-dokumen tanpa mengatakan secara spesifik sama ada cek-cek dan dokumen-dokumen ini berkaitan dengan dengan kes ini, adalah juga

pernyataan kosong yang dikira akan memalingkan isu sebenar pertikaian daripada dipertimbangkan secara telus (lihat perenggan 9).

(4) Fakta bahawa defendan mungkin tidak menandatangani dokumen-dokumen yang dieksibitkan dalam afidavit sokongan plaintif di hadapan peguambela dan peguamcara Phang Sweet Lee, yang bertindak untuk plaintif adalah tidak relevan memandangkan defendan telah mengaku bahawa beliau sebenarnya telah menandatangani kesemua dokumen-dokumen yang dieksibitkan dalam afidavit sokongan plaintif termasuklah perjanjian kemudahan. Defendan adalah terikat dengan dokumen-dokumen yang mana beliau telah menandatanganinya dengan plaintif. Beliau juga gagal menunjukkan melalui 'afidavit atau sebaliknya' bahawa Esmail telah berpakat dengan pekerja-pekerja plaintif dalam melaksanakan kemudahan yang telah diberikan plaintif kepadanya (lihat perenggan 10–11).]

Notes

For cases on appeal of summary judgment, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6883–7049.

For cases on whether triable issues raised, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7566–7619.

Cases referred to

Anglo-Italian Bank v Wells [1878] 38 LT 197 (refd)
Dr ST Singam v Lee Siew Leong [2006] 6 AMR 393 (refd)

Legislation referred to

Rules of the High Court 1980 O 14

Lee Wooi Mien (Tan Lee Chin with her) (Shook Lin & Bok) for the plaintiff.
Harpal Singh Grewal (Jasvinjit Singh with him) (AJ Ariffin Yeo & Harpal) for the defendant.

Kang Hwee Gee J:

[1] This is an appeal by the plaintiff against the decision of the senior assistant registrar in refusing the plaintiff's application for summary judgment under O 14 of the Rules of the High Court 1980.

[2] The plaintiff's claim arose from a margin facility granted to the defendant vide the following documents:

(i) letter of offer dated 17 June 2003;

(ii) margin facility agreement dated 10 July 2003;

(iii) memorandum of deposit of shares dated 10 July 2003.

[3] The loan was granted for both advances to the borrower as well as to enable the defendant to engage in margin trading through a stockbroking firm called Avenue Securities Sdn Bhd.

[4] The defendant defaulted in maintaining the requisite margin and had therefore defaulted under cl 13.01 of the facility agreement and hence this action. **A**

The application was opposed by the defendant on the following grounds: (verbatim by counsel for the defendant) —

1. There was a conspiracy between the plaintiff bank's employees and one Encik Esmail bin Naziadin who was in close association with the plaintiff to create a sham facility using the defendant's account with the bank to trade in shares and to utilise the personal loan for the benefit of Esmail. Esmail had represented to the defendant that he had connections with the plaintiff's employees and that he would together with these employees conduct the trading on the share market. The defendant named one of the employees as Puan Anis Fatina who the defendant claimed had actively participated in the affairs of the defendant under the direction of Esmail. **B** **C**

   The particulars of conspiracy are as follows — **D**

   (i) The whole transaction was orchestrated by Esmail and the employees of the bank.

   (ii) The employees provided all the documents in blank to Esmail and Esmail obtained the signature of the defendant and handed the documents to solicitors of the plaintiff for attestation. **E**

   (iii) The plaintiff's employees then inserted various particulars in the blank documents including the appointment of Esmail as the remisier appointed by the defendant and acceptable to the bank.

   (iv) This scheme was actually widespread and similar transactions were entered into with the knowledge of the plaintiff with several other persons. **F**

   (v) The plaintiff or its officers did not personally make any credit check and dealt with the defendant only through Esmail.

2. The execution of blank documents — the defendant was asked to execute all the documents exhibited by the plaintiff in encl 5 at his place of business in Subang Jaya. **G**

   (i) The defendant did not execute any of the documents before the plaintiff's officers or the plaintiff's solicitors as reflected in the document.

   (ii) There is evidence in the affidavit of the personal clerk of Esmail that she had handled the documents of the defendant on Esmail's instruction. There is also another affidavit by the same person that Esmail had instructed her to keep documents on Maybank account and had seen Esmail using the cheques and inserting details in the cheques and faxing details to the plaintiff at the Bukit Bintang Branch. She believed that the account operated by Esmail was part of the scheme with the plaintiff to enable Esmail to transact on third party account. **H** **I**

   (iii) The defendant did not appoint any stockbroker although he signed the letter of appointment in blank. He was approached by Esmail to sign all the documents on the promise by Esmail that with his connection with the

plaintiff this scheme will benefit him and Esmail. The defendant acted on the representation made by Esmail and has no connection with the bank.

Reply by counsel for the plaintiff: (verbatim)

(1) We have documentary evidence to prove that the defendant is raising a sham defence, see

(i) application for a loan under exh 'ABB–8' encl 13 which is signed by the defendant in a form. The remisier appointed by the defendant is stated in this form as Lynette Tan of Avenue Securities Sdn Bhd KL branch. In this form the defendant has also stated that he is the manager in Motorola. He signed the letter of offer to accept the facilitiy on 30 June 2007. He also signed the facility agreement on all the relevant pages as well as the Power of Attorney and Memorandum of Deposit. He had admitted to signing these documents.

(ii) Drawdown Notice in exh 'ABB–9' encl 13 shows he requested for advance of RM350,000 cash to be paid into his Maybank account at Kelana Jaya. He also admitted signing the Drawdown Notice. Contemporaneous with this Drawdown Notice is plaintiff's inter-office memorandum from the manager of Bukit Bintang Branch to the head of Treasury requesting the transfer of fund of the sum of RM350,000 into a Maybank account of the defendant at Kelana Jaya. This is confirmed by the entry in the statement of account on 15 April 2005 exh 'ABB–5' of encl 5. He did say in Enclosure 15 that he gave the cheque book to Esmail but this is his business.

(iii) Transfer notice issued by the Bursa Malaysia to the nominee of the plaintiff Affin-ACF stating that security has been transferred from the defendant's CDS account to his pledged shares account with the plaintiff (probably to balance the margin) in respect of 210,000 units of Fountain View Bhd shares on 14 April 2005. This document verifies that the defendant is personally transacting with the shares in his account. This shows that he must have caused the transfer either personally or had authorised the transfer.

(In answer to query by court why no affidavit from the remisier Lynette Tan:

The document shows clearly that the defendant himself had utilised the loan. The plaintiff is not a stockbroking firm with remisiers but purely a financial institution as defined under the Banking and Financial Institution Act 1989.)

(iv) There is no police report made on forgery or fraud on the part of the plaintiff.

Reply by counsel for the defendant: (verbatim)

(1) The appointment of stockbroker from the documents of the plaintiff was left blank raising the presumption that the bank had a say.

(2) There are circumstances which ought to be tried, see *Dr ST Singam v Lee Siew Leong* [2006] 6 AMR 393 at p 395 held 2(a):

> 2(a) When a document or an instrument, on its production, appears to have been altered, it is the general rule that the party offering it in evidence must explain the alteration. It is well settled law that a party who has the custody of an instrument or document made for his benefit is bound to preserve it in its original state and any material alteration of it will vitiate the instrument, if it was done without the consent of the other party. As that had actually taken place in this case, the unilateral alteration in itself was sufficient to enable the landlord to treat D9 as being non-binding on him.

FINDINGS AND DECISION

[5] Order 14 r 1 read as follows:

(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the court for judgment against that defendant.

(2) Subject to paragraph (3), this rule applies to every action begun by writ other than one which includes —

(a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or

(b) a claim by the plaintiff based on an allegation of fraud.

(3) This order shall not apply to an action to which O 81 applies.

The White Book (1988 Ed), p 139 says as follows:

> The purpose of O 14 is to enable a plaintiff to obtain summary judgment without trial, if he can prove his claim clearly, and if the defendant is unable to set up a bona fide defence, or raise an issue against the claim which ought to be tried (*Roberts v Plant* [1895] 1 QB 597 (CA); *Robinson & Co v Lynes* [1894] 2 QB 577; *Dane v Mortgage Ins Corp* [1894] 1 QB 54 (CA); *Nassau Steam Press v Tyler* [1894] 70 LT 376; *Edwards v Davis* [1888] 4 TLR 385 (CA).

[6] When the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff (per Jessel MR, *Anglo-Italian Bank v Wells* [1878] 38 LT 197, p 201 (CA)).

[7] In this proceeding therefore the questions that should be addressed are two fold.

1. Whether there is a defence:

   By his statement of defence the defendant had denied any knowledge of the facilities which he signed. He had also claimed (without providing particulars)

A that the plaintiff had breached the terms of the agreement, and had disposed all the securities it held in the account inappropriately. On the other hand, his opposing affidavit did not allude to the defence he set up but alleged instead that a third party Esmail had colluded with the employees of the plaintiff to make use of his trading account. One can therefore conclude with certainty that his defence clearly is a sham.

B

2. Whether there is a fairly arguable point to be argued:

The plaintiff has set out in a clear and orderly manner its claim against the defendant exhibiting the relevant documents to support the fact that the defendant had executed for the loan, the breach of the margin, the failure of the defendant to rectify the default, and the computation of the sums due.

C

[8] Flowing from this, the defendant is unable to show that there is a fairly arguable case that ought to go for trial. His claim that the employees of the plaintiff had colluded with a third party called Esmail who had used his account is but a bare assertion not substantiated by any specific particulars. Similarly the affidavits affirmed by the former personal clerk of Esmail deposing to the fact that her previous employer Esmail had dealt with the plaintiff's cheques and documents without saying specifically whether these were cheques and documents relating to this case, are also bare assertions calculated to deflect the real issue in dispute from being properly deliberated upon.

D

E

[9] The fact that the defendant may not have signed the documents exhibited in the plaintiff's supporting affidavit before the advocate and solicitor Phang Sweet Lee, who acted for the plaintiff is irrelevant as the defendant had admitted that he had indeed signed all the documents exhibited in the supporting affidavit of the plaintiff including the facility agreement.

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[10] The defendant is bound by the documents that he signed with the plaintiff. He has failed to show by 'affidavit or otherwise' that Esmail had colluded with the employees of the plaintiff in operating the facility that the plaintiff granted to him.

G

[11] I am satisfied that there is no defence to the plaintiff's claim and no fairly arguable case to be argued on behalf of the defendant.

[12] The appeal is allowed with costs. There shall be an order in terms of the plaintiff's application.

H

Appeal allowed with costs.

Reported by Brendan Navin Siva

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